IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1280 OF 2007

Sitaram Soma Mhatre & Ors..... ....Petitioners
V/s
Babu Soma Mhatre & Ors.. ....Respondents.

Mr.Kiran J. Kandpile, Adv. For the petitioners.

Respondent Nos.1 & 2 absent though served.

CORAM: A.P.DESHPANDE, J.
3/10/07

PC:

Rule. Rule made returnable forthwith.

Taken up for final hearing by consent of parties.

This Court by an order dated 23.2.07 issued notice to the respondents and granted stay to the impugned order. Despite service of notice no one appeared for the respondents. As the respondents were not put on notice that writ petition would be heard and finally decided at the admission stage yet again this Court directed reissue of notices to the respondents intimating them that the writ petition will be heard and decided finally at the admission stage. This was so directed by an order dated 8.8.07. Despite service of notices for the second time the respondents have not put in appearance and thus I am constrained to decide the writ petition with the assistance of the learned counsel for the petitioner.

2. The present petitioner is original plaintiff who instituted a suit for partition and separate possession of the suit properties by claiming that the suit properties are joint family properties. The respondent No.1 who is defendant No.1 in the trial Court filed written statement and

contended that three out of nine properties which form the subject matter of the suit are self acquired properties and cannot form part of the joint family properties whereas in regard to remaining six properties are concerned defendant No.1 had admitted the same to be joint family properties. The properties which are claimed to be self acquired properties are at Sr.Nos.2, 7 and 8 of para 1 of the plaint. Parties being in know of their respective cases chose to lead evidence and after recording of entire evidence of the plaintiff so also of the defendant case was closed for arguments. Pursis to that effect were filed by respective parties. It is thereafter when the suit was fixed for final arguments that defendant No.1 moved an application seeking to amend written statement with a view to contend that some of the joint family properties are not included as joint family properties in the suit and thus the suit is for partial partition and not maintainable in law. The trial Court has proceeded to allow the amendment application. Without proper consideration of the objections raised by the present petitioner by a cryptic non reasoned order at the belated stage.

3. Learned counsel for the petitioner has pointed out that the present suit is of the year 2005 and thus the amendment application filed therein need to be regulated by amended provisions of order 6 rule 17 as the amendment to Code of Civil Procedure had come into force on 1.7.2002. The submission is that proviso to order 6 rule 17 lays down that no amendment shall be allowed after the trial commences unless the party applying for the same points out that despite exercise of due diligence the proposed amendment could not have been brought on record. In the present case there is absolutely no whisper in the impugned order about reason for inordinate delay in filing the amendment application. The application seems to have been allowed as a matter of course more so, when the suit had reached the stage of final arguments. The proposed

amendment virtually goes to reopen the entire case and parties will be required to be given an opportunity to lead evidence afresh. As the objection in regard to non inclusion of all the joint family properties in the suit could have been taken earlier had the defendant been diligent, in my view, the impugned order suffers from patent illegality and thus needs to be interfered with. In the result writ petition is allowed. The impugned order dated 30.1.06 is quashed and set aside. Rule made absolute in above terms.

3.10.07